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NOT FOR CITATION

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

EQUILON ENTERPRISES LLC, a Delaware Corporation, d/b/a SHELL OIL PRODUCTS US,

Plaintiff,

V.

MEHDI SHAHBAZI, et al.,

Defendants.

MEHDI SHAHBAZI,

Counter-Claimant,

V.

EQUILON ENTERPRISES LLC, a Delaware Limited Liability Company, d/b/a SHELL OIL PRODUCTS;
US PENINSULA PETROLEUM LLC, a California Limited Liability Company;
DOES 1 through 20, Inclusive,

Counter-Defendants.

Plaintiff Equilon Enterprises LLC (“Equilon”) moves for summary judgment on all

¹ This disposition is not designated for publication and may not be cited.

1 claims asserted in its first amended complaint (“FAC”) and on all counterclaims and affirmative
 2 defenses asserted by Defendant Mehdi Shahbazi (“Shahbazi”).² Shahbazi opposes the motions.
 3 The Court heard oral argument on June 29, 2007. For the reasons set forth below, the motions
 4 will be granted in part and denied in part.

5 I. BACKGROUND

6 Shahbazi has maintained a Shell gasoline station at 3030 Del Monte Avenue in Marina,
 7 California (“Marina station”) as a franchisee since 1982. Supp. Shahbazi Decl. 2. Equilon was
 8 formed in 1998 as a result of a business agreement between Shell Oil Company and Texaco, Inc.
 9 FAC ¶ 7. As a result, Equilon succeeded to all of Shell’s rights and obligations under a number
 10 of fuel supply agreements and station leases, including a fuel agreement and lease with Shahbazi
 11 regarding the Marina Station. *Id.* Equilon now does business as Shell Oil Products US (“Shell”).
 12 *Id.*

13 In January, 2002, Equilon assigned its interest in the fuel supply agreement for the Marina
 14 station to Peninsula Petroleum LLC (“Peninsula”), a wholesale distributor of motor fuels. Eaves
 15 Decl. ¶ 2. However, Equilon retained its interest in the Marina station lease. *Id.* On November
 16 7, 2003, Peninsula and Shahbazi renewed the retail sales agreement for the fuel supply at the
 17 Marina station (“the RSA”). *See* Castelo Decl. Ex. A. The RSA requires that Peninsula supply
 18 Shahbazi with Shell gasoline and permits Shahbazi to use Shell trademarks. The RSA provides
 19 that Shahbazi must “preserve and promote the reputation of [Peninsula]” and must take steps to
 20 “achieve public acceptance of” its products. RSA ¶ 7. It permits Shahbazi to display signs
 21 necessary to identify the Shell gasoline for sale and its price, and prohibits Shahbazi from
 22 displaying or using “any other signs, posters, flags, pennants, or other advertising devices without
 23 [Peninsula’s] prior written approval.” *Id.* ¶ 7(p). The RSA provides that Peninsula may
 24 terminate the agreement for Shahbazi’s “failure to comply with any provision of the Agreement,

26 ² Equilon has filed two motions for partial summary judgment. The first motion pertains
 27 to the first, second, and seventh claims in the FAC. The second motion pertains to the third
 28 through sixth claims of the FAC and Shahbazi’s counterclaims and affirmative defenses.

1 which provision is both reasonable and of material significance to the relationship.” *Id.* ¶
 2 23(a)(1).

3 On or about April 30, 2004, Shahbazi and Equilon entered into a new lease for the Marina
 4 station (“the Lease”), with an expiration date of April 30, 2007. *See* Eaves Decl. Ex. C. The
 5 Lease provides that Shahbazi “shall devote [his] reasonable efforts to preserve the value of the
 6 Premises . . . and the reputation of [Equilon] by serving effectively and efficiently the needs of
 7 the public and consumers.” Lease ¶ 5. The Lease also states that Equilon “may terminate this
 8 Lease [for Shahbazi’s] failure to comply with any provision of this Lease, which provision is
 9 both reasonable and of material significance to the relationship under the Lease.” *Id.* ¶ 18(a)(1).
 10 These provisions include the “failure to pay [Equilon] in a timely manner when due rent and all
 11 other sums to which [Equilon] is legally entitled,” *id.* ¶ 18(a)(3)(vii), or the termination of the
 12 RSA. *Id.* ¶ 18(a)(5). The Lease further provides that “[u]pon termination or nonrenewal of this
 13 Lease, [Shahbazi] shall peaceably surrender the Premises to [Equilon]. . . . If necessary
 14 [Equilon] may re-enter or repossess the Premises without affecting any other legal rights or
 15 remedies available to Lessor under this Lease or otherwise.” *Id.* ¶ 19(a).

16 In October 2005, Shahbazi posted two signs at the Marina station. Castelo Decl. ¶ 6.
 17 Shahbazi’s first sign read, “Consumers’ pain is big oil’s unearned profit! To oppose it see
 18 cashier.” Castelo Decl. Ex. C. His second sign read, “Big oils are price gouging and profiteering!
 19 To participate in roll back see cashier.” *Id.* Exs. D & E. Shahbazi also stacked a newspaper rack
 20 at the Marina station with copies of a two-page letter, which included the following statement in
 21 its title: “‘Consumer Alert’ Outrageous gouging by all oil companies rip-off in action across the
 22 nation. Do not blame the operator of your neighborhood station.” Kassebaum Decl. ¶ 3 & Ex. B.
 23 The letter advised customers to “stop buying from [sic] ‘Company stores’ or from large
 24 distributor sites stations where [it] is possible until prices go down to a fair market value.” *Id.*
 25 Ex. B.

26 On November 7, 2005, Equilon began an environmental upgrade of the fuel dispensers at
 27 the Marina station. Opposition 7, Martin Decl. ¶ 2-3. Equilon placed construction fences around
 28

1 the gasoline dispensers to prevent the public from entering the construction area. *Id.* ¶ 5.³ The
 2 parties agree that the construction took longer than anticipated, but disagree as to the reasons for
 3 this delay.

4 Also on November 7, 2005, Peninsula sent Shahbazi a letter demanding that he stop
 5 displaying the two signs and stop distributing the letters. Castelo Decl. ¶ 7 & Ex. F.⁴ On
 6 November 14, 2005, Peninsula sent Shahbazi a notice of termination. *Id.* ¶ 8 & Ex. G. The
 7 notice stated that Peninsula would terminate the RSA effective November 24, 2005 because
 8 Shahbazi had “not removed the signs in violation of the Agreement.” *Id.* On November 17,
 9 2005, Equilon sent Shahbazi a notice stating that the Lease would be terminated effective
 10 November 24, 2005, based on Peninsula’s termination of the RSA and Shahbazi’s failure to take
 11 reasonable efforts to preserve Equilon’s reputation. Eaves Decl. Ex. D.

12 On November 18, 2005, Equilon informed James Martin, the Equilon engineer
 13 overseeing the upgrade work at the Marina station, that the Lease had been terminated and
 14 instructed him not to remove the construction fences when work was complete. Martin Decl. ¶ 7.
 15 On November 21, 2005, Shahbazi wrote to Equilon stating that he “absolutely” would not vacate
 16 the Marina station, but that he would remove the signs. *See* Eaves Decl. Ex. F. Equilon
 17 completed the fuel pump upgrades on December 2, 2005, and placed locks on the underground
 18 fuel storage tanks to prevent Shahbazi from placing any more fuel in them. Martin Decl. ¶¶ 7, 9.
 19 Equilon does not dispute Shahbazi’s contention that the locks and fences are still in place, but
 20 asserts that the locks and fences could be removed easily. Martin Decl. ¶ 10.⁵

21
 22 ³ Shahbazi states that erecting fences in the manner done here was unlike any other work
 23 Shell had done previously. He claims that Shell typically works on one island, while leaving the
 24 other island open for business. Opposition 8. Plaintiff states that Shell almost always erects
 25 fencing in this manner when performing this type of upgrade. Martin Decl. ¶ 5.

26 ⁴ Peninsula gave Shahbazi one day to cease the activities it believed constituted a breach
 27 of the RSA. *Id.* at Ex. F.

28 ⁵ The parties appear to disagree as to the functionality of the point of sale system after the
 29 upgrade work was completed. Equilon asserts that the point of sale system only needed to be
 30 programmed to communicate with the cash register, a task that Shahbazi could have had

1 On December 9, 2005, Equilon filed a complaint against Shahbazi and Balwinder Singh
 2 (“Singh”), seeking: (1) declaratory relief regarding the RSA and the Lease; (2) declaratory relief
 3 regarding the retail sales agreement and lease for a station in Salinas, California; and (3)
 4 injunctive relief. On December 12, 2005, Equilon moved for a preliminary injunction requiring
 5 Shahbazi to vacate the Marina station and surrender it to Equilon. On February 1, 2006,
 6 Shahbazi answered the complaint and filed counterclaims against Equilon and Peninsula⁶ for (1)
 7 violation of the Petroleum Marketing Practices Act (“PMPA”), and (2) breach of contract.⁷

8 On April 13, 2006, the parties stipulated to the dismissal of the claims pertaining to the
 9 station in Salinas. The parties further stipulated to the dismissal of all counterclaims asserted by
 10 Singh against Equilon. On June 1, 2006, the Court issued an order denying Equilon’s motion for
 11 preliminary injunction.⁸ On July 7, 2006, Equilon moved for leave to file the FAC. On
 12 September 25, 2006, that motion was granted. The FAC includes no claims regarding the station
 13 in Salinas or against Singh. It asserts seven claims against Shahbazi for: (1) declaratory relief
 14 regarding the validity of the Lease and the RSA; (2) injunctive relief regarding termination; (3)
 15 breach of the Lease by failure to surrender the station; (4) breach of the Lease by disparaging
 16 acts; (5) breach of the RSA by disparaging acts; (6) injunctive relief regarding disparaging acts;
 17 and (7) trespassing. Shahbazi answered the FAC on November 1, 2006.

18 On August 8, 2006, while its motion for leave to file an amended complaint was pending,

20 completed at a cost of approximately \$2,000. Martin Decl. ¶¶ 9-10. Shahbazi asserts that
 21 Equilon “refused to deliver appropriate POS for dispensers.” Opposition 9.

22 ⁶ To date, Shahbazi has not pursued his counterclaim against Peninsula.

23 ⁷ On December 28, 2005 the undersigned judge found that the instant case, originally
 24 assigned to Judge James Ware, is related to a prior case that had been assigned to the
 25 undersigned judge. The prior case, number C 03-0212 JF, *Shahbazi, et al. v. Equilon Enterprises*
 26 *LLC, et al.*, alleged violations of the Petroleum Practices Marketing Act (“PMPA”). It resulted
 in entry of summary judgment in favor of Equilon. Shahbazi’s pendent state law claim was
 dismissed pursuant to 28 U.S.C. § 1367(c)(3).

27 ⁸ Equilon filed another motion for preliminary injunction on July 7, 2006, but withdrew
 28 that motion on August 29, 2006.

1 Equilon sent Shahbazi a second notice of termination of the Lease. *See* Whitlock Decl. Ex. A.
 2 This notice stated an effective date of November 10, 2006 and asserted four new grounds for
 3 termination: (1) further conduct at the Marina station designed to harm the reputation of Equilon;
 4 (2) Shahbazi's residence at the Marina station; (3) failure to pay in a timely manner when due all
 5 sums to which Equilon is legally entitled, namely the sanctions and costs the Monterey Superior
 6 Court ordered Shahbazi to pay Equilon in *Shahbazi v. Equilon Enterprises, LLC, et al.*, Case No.
 7 M50542; and (4) Shahbazi's insolvency.

8 On October 9, 2006, Equilon sent Shahbazi a third notice of termination. *See* Whitlock
 9 Decl. Ex. B. This notice stated an effective date of January 11, 2007, and asserted three
 10 additional grounds for termination: (1) Shahbazi's delinquency on state tax payments related to
 11 the Marina station; (2) further conduct at the Marina station designed to harm the reputation of
 12 Equilon; and (3) threats against Equilon.

13 II. LEGAL STANDARD

14 A motion for summary judgment should be granted if there is no genuine issue of
 15 material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P.
 16 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). The moving party bears
 17 the initial burden of informing the Court of the basis for the motion and identifying the portions
 18 of the pleadings, depositions, answers to interrogatories, admissions, or affidavits that
 19 demonstrate the absence of a triable issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S.
 20 317, 323 (1986). If the moving party meets this initial burden, the burden shifts to the non-
 21 moving party to present specific facts showing that there is a genuine issue for trial. Fed. R. Civ.
 22 P. 56(e); *Celotex*, 477 U.S. at 324. A genuine issue for trial exists if the non-moving party
 23 presents evidence from which a reasonable jury, viewing the evidence in the light most favorable
 24 to that party, could resolve the material issue in his or her favor. *Anderson*, 477 U.S. 242, 248-
 25 49; *Barlow v. Ground*, 943 F. 2d 1132, 1134-36 (9th Cir. 1991). It is not the Court's task to
 26 "scour the record in search of a genuine issue of triable fact." *Keenan v. Allan*, 91 F.3d 1275,
 27 1279 (9th Cir. 1996) (internal citations and quotations omitted). It is the non-moving party's
 28

1 responsibility to identify with reasonable particularity the evidence which precludes summary
 2 judgment. *See id.*⁹

3 III. DISCUSSION

4 1. Claim One - Declaratory Relief Regarding the Lease and the RSA

5 Equilon moves for summary judgment on its claim seeking a declaration that it
 6 terminated the Lease validly and that Peninsula terminated the RSA validly. Neither party
 7 disputes for the purpose of the instant motions that either the Lease or the RSA falls under the
 8 scope of the PMPA. That statute requires the statement of a valid ground for termination.¹⁰ 15
 9 U.S.C. § 2802(b)(1). It enumerates five grounds for termination and an additional four grounds
 10 for non-renewal. 15 U.S.C. § 2802(b)(2)-(3). The enumerated grounds for termination include
 11 the “failure by the franchisee to comply with any provision of the franchise, which provision is
 12 both reasonable and of material significance to the franchise relationship,” 15 U.S.C. §
 13 2802(b)(2)(A), and the “occurrence of an event which is relevant to the franchise relationship and
 14 as a result of which termination of the franchise is reasonable.” 15 U.S.C. § 2802(b)(2)(C).¹¹
 15 The PMPA requires ninety-day notice prior to termination, with shorter notice permitted “in
 16 circumstances in which it would not be reasonable” to give the full ninety-day notice. 15 U.S.C.
 17
 18

19 ⁹ The standard applied to a motion seeking partial summary judgment is identical to the
 20 standard applied to a motion seeking summary judgment of the entire case. *Urantia Foundation*
 21 *v. Maaherra*, 895 F.Supp. 1335, 1335 (D. Ariz. 1995).

22 ¹⁰ In litigation, a franchisor may rely only upon grounds stated in the notice of
 23 termination. *Khorenian v. Union Oil*, 761 F.2d 533, 535 n.1 (9th Cir. 1985) (prohibiting reliance
 24 on an asserted ground for termination that was not mentioned in the notice of nonrenewal).

25 ¹¹ The PMPA’s definition of “failure” as used in section 2802 (b)(2)(A) excludes
 26 technical or minor violations of the contract. “Considering termination an extreme remedy,
 27 Congress intended to restrict that remedy to contractual violations that are so serious as to
 28 undermine the entire relationship.” *Chevron v. El-Khoury*, 285 F.3d 1159, 1163 (9th Cir. 2002)
 (citing S.Rep. No. 95-731, at 18 (1978)). Section 2802(b)(2)(C) does not include the word
 “failure.” However, it “incorporates it by reference,” along with its materiality requirement. *El-
 Khoury*, 285 F.3d at 1163.

1 § 2804(b)(1).¹²

2 a. Declaratory Relief Pertaining to the Lease

3 Equilon asserts that each of its three notices of termination of the Lease was valid under
 4 the PMPA. For the reasons discussed below, the Court concludes that Equilon is entitled to
 5 summary adjudication of the validity of the second, but not the first, notice of termination of the
 6 Lease. Because its determination as to the second notice is dispositive, the Court does not assess
 7 the validity of the third notice.

8 i. Equilon's First Notice of Termination of the Lease (November 17, 2005)

9 Equilon's first notice of termination, dated November 17, 2005, states two grounds for
 10 termination: (1) Peninsula's termination of the Peninsula RSA; and (2) Shahbazi's failure, by
 11 posting signage at the Marina station, to devote his "reasonable efforts to preserve . . . the
 12 reputation of [Equilon]." The first notice of termination identified November 24, 2005 as the
 13 effective termination date. While this seven-day notice does not meet the ninety-day notice
 14 requirement of section 2804(a), Equilon argues that, given the circumstances of the termination,
 15 the notice was nonetheless "reasonable" and thus within the exception provided by section
 16 2804(b)(1). The Ninth Circuit has described the appropriateness of a shortened period as a
 17 "mixed question of law and fact." *Abujudeh v. Mobil Oil Corp.*, 841 F.2d 310, 311 (9th Cir.
 18 1988).¹³

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- 19
- 20 ¹² (a) the franchisor shall furnish notification of such termination . . . to the
 21 franchisee, except as provided in subsection (b), not less than 90 days prior to the
 22 termination date.
 23 (b) In circumstances in which it would not be reasonable for the franchisor
 24 to furnish notification, . . . such franchisor shall furnish notification to the
 25 franchisee on the earliest date on which furnishing of such notification is
 26 reasonably practicable

27 15 U.S.C. §§ 2804(a)-(b)

28 ¹³ In *Abujudeh*, Mobil had terminated its lease with twelve-day notice after the franchisee
 failed to comply with city ordinances and the city revoked Mobil's license. Mobil had been
 arguing with Abujudeh for six months regarding compliance with the ordinances. Two months
 after the termination letter was sent, Abujudeh sent a letter indicating his intention to conform to

1 The Court concludes that Equilon is not entitled as a matter of law to a declaration that
 2 the seven-day notice given in its first notice of termination of the Lease is reasonable under the
 3 circumstances that existed at the time of the notice. The parties dispute the placement of the
 4 signage and of the harm done by the signage to Equilon. *See* Opposition 11. Because Peninsula
 5 gave the presence of this signage as one of the reasons for its termination of the RSA, similar
 6 factual disputes underlie the adequacy of notice given by Peninsula's with respect to its
 7 termination of the RSA.¹⁴ Equilon does not identify evidence establishing that Shahbazi
 8 reasonably could have removed any property he owned at the station within a week. Nor does
 9 Equilon identify evidence contradicting Shahbazi's assertion that he removed the signs after
 10 receiving the first notice of termination. While Equilon may be able to prove at trial that the
 11 shortened notice period given by the first termination notice was reasonable, the Court cannot
 12 resolve that question in Equilon's favor on summary judgment. In light of this conclusion, the
 13 Court need not decide whether an issue of material fact exists as to the sufficiency of the stated
 14 grounds of termination.

15 ii. Equilon's Second Notice of Termination of the Lease (August 8, 2006)

16 Equilon delivered its second notice of termination on August 8, 2006. The notice stated
 17 an effective termination date of November 10, 2006. Shahbazi does not argue or present
 18 evidence suggesting that the notice provided by the second notice of termination was inadequate.
 19 Rather, Shahbazi disputes the adequacy of the six stated grounds for termination: (1) Peninsula's
 20 termination of the RSA; (2) Shahbazi's failure, by posting the signs opposing big oil, to meet a
 21 requirement of the Lease; (3) Shahbazi's conduct at the Marina station premises during and after
 22 January 2006 that allegedly violated the Lease and court orders; (4) Shahbazi and another

23
 24 the requirements. The Ninth Circuit focused on these apparently undisputed circumstances and
 25 found the twelve-day notice of termination sufficient under 2804(b). *Id.* at 311-13.

26 ¹⁴ Equilon does not explain in its motion why seven days notice was rendered reasonable
 27 by Peninsula's previous notice of termination of the RSA. Nor does it address what appears to
 28 be a factual dispute between the parties as to the possibility that Shahbazi could have organized
 for another supplier to have replaced Peninsula, or the legal relevance of that apparent dispute.

1 individual's residence at the Marina station in violation of the Lease; (5) Shahbazi's failure to
 2 pay Shell in a timely manner all funds due as a result of prior litigation; and (6) Shahbazi's
 3 insolvency. Equilon focuses on the fifth and sixth grounds in its moving papers. Both grounds
 4 are enumerated "event[s] which [are] relevant to the franchise relationship and as a result of
 5 which termination of the franchise or nonrenewal of the franchise relationship is reasonable."

6 See 15 U.S.C. § 2802(c). Accordingly, Equilon must prove that those events are "serious enough
 7 to warrant termination," *El-Khoury*, 285 F.3d at 1164, a question that implicates issues of fact.

8 *Id.*

9 Equilon proffers evidence tending to prove that on August 8, 2006, the date of the second
 10 termination notice, Shahbazi owed Equilon \$5,000 in sanctions as a result of earlier state-court
 11 litigation.¹⁵ See West Decl. Exs. X (sanctions imposed on April 28, 2005).¹⁶ Shahbazi offers no
 12 evidence challenging this debt or showing that this amount has been paid. Shahbazi asserts that
 13 he intended to pay off this debt and that his failure to do so stems from Equilon's earlier actions
 14 associated with the first attempted termination of the Lease. However, Shahbazi provides no
 15 evidence from which it may be inferred that he would have paid this debt but for the actions of
 16 Equilon.¹⁷ While concerns broader than vindicating its right to the sanctions may have motivated

18 ¹⁵ Equilon notes that even if the judgment of the Monterey Superior Court is under
 19 appeal, "a judgment for sanctions plus incidental costs of suit . . . is stayed on appeal only if the
 20 entire amount [sanctions and costs] is bonded." Motion One 14 n.12 (citing Eisenberg et al., *Cal.
*Practice Guide: Civil Appeals and Writs** (The Rutter Group 2003) ¶ 7:133.9).

21 ¹⁶ The Monterey Superior Court also imposed costs of \$7,570.93 on November 16, 2006,
 22 three months after the date of the second notice of termination. See West Decl. Ex. Y. The
 23 Court has not considered those costs in evaluating the validity of the second notice of termination
 24 of the Lease, nor does it evaluate the other debts in its favor that Equilon alleges that Shahbazi
 has accrued since the second notice of termination or the other subsequent grounds for
 termination.

25 ¹⁷ Shahbazi has referred to the second and third notices of termination of the Lease as
 26 flowing from the first notice of termination as part of a domino effect. However, Shahbazi offers
 27 no evidence in support of this characterization of the relationship among the termination notices.
 28 As discussed below, even if Equilon's first notice of termination is invalid, Shahbazi fails to
 respond to Equilon's argument that he cannot identify evidence of damages caused by Equilon's

1 Equilon to terminate the Lease, Shahbazi's argument that Equilon's termination of the Lease was
 2 pretextual does not cast doubt upon the validity of the debt or of his failure to make repayment.
 3 Nor has Shahbazi provided any evidence tending to prove that this failure is not material to the
 4 franchise agreement.¹⁸ Accordingly, the Court concludes that no issue of fact exists as to
 5 whether Equilon, in its second notice of termination, terminated the Lease on a ground that was
 6 material to the franchise relationship. *See e.g. Harara v. ConocoPhillips Co.*, 377 F.Supp.2d
 7 779, 791-92 (N.D. Cal. 2005) ("There is no doubt that failure to make timely payments of all
 8 sums to which the franchisor is legally entitled is grounds for termination under the PMPA.").¹⁹

9 The Court has received supplemental briefing as to whether it may enter partial summary
 10 judgment as to the second termination notice even though that notice is not mentioned in the
 11 FAC. In light Shahbazi's failure to identify prejudice, and because the Court has discretion to
 12 treat the motion for summary judgment as a motion to amend the FAC, the Court concludes that
 13 it may grant this relief without requiring Equilon to file a second amended complaint. *See e.g.*
 14 *William Inglis & Sons Baking Co. v. ITT Continental Baking Co., Inc.*, 668 F.2d 1014, 1053 n.68
 15 (9th Cir. 1981) ("Amendments for the purpose of adding new claims are clearly permitted by
 16 Rule 15 and may be introduced and considered during the pendency of a motion for summary
 17 judgment. 6 Moore's Federal Practice P 56.10 (2d ed. 1976). 'Indeed at times it will be feasible
 18 to treat the pleading as though it were amended to conform to the facts set forth in the affidavits.'
 19 *Id.* at 56-171."). Accordingly, the Court concludes that Equilon is entitled to a judicial
 20 declaration that the Lease was terminated validly no later than November 10, 2006, the
 21 termination date stated in the August 8, 2006 notice.

22 _____
 23 behavior.

24 ¹⁸ This distinguishes the instant action from *El-Khoury*. *See El-Khoury*, 285 F.3d at
 25 1164-65 (concluding that the defendant had provided sufficient evidence, including testimony
 26 from Chevron executives, earlier dealer agreements, and Defendant's eventual payment of the tax
 deficiency, to show that his failure to pay state tax was not material to the franchise relationship).

27 ¹⁹ In light of this conclusion, the Court need not assess the other grounds for termination
 28 asserted in Equilon's second notice of termination of the Lease.

1 b. Declaratory Relief Pertaining to the RSA

2 Equilon also seeks a declaration that Peninsula terminated the RSA validly in its notice
 3 dated November 14, 2005. The stated ground for termination was that Shahbazi had violated
 4 sections 7(a) and 7(p) of the RSA which require that he “diligently and efficiently merchandise
 5 and promote the Products at [the Marina] Station,” and “not display or use any other signs,
 6 posters, flags, pennants, or other advertising devices without [Peninsula’s] prior written
 7 approval.” RSA ¶¶ 7(a), (p).

8 Peninsula’s termination notice provided ten days notice of the termination. As it did with
 9 respect to Equilon’s first notice of termination, the Court concludes that a triable issue of
 10 material fact exists as to whether such a brief period was reasonable under the circumstances.
 11 Because the record does not reflect a subsequent notice of termination by Peninsula, the Court
 12 may not grant summary adjudication of Equilon’s claim for the declaration that Peninsula
 13 terminated the RSA validly.

14 **2. Claim Two - Injunctive Relief Regarding Termination**

15 Equilon seeks a permanent injunction ordering Shahbazi to vacate and surrender the
 16 Marina station, and to restore to Equilon the use and possession of the premises. As discussed
 17 above, Equilon is entitled to summary adjudication of the first claim with respect to the second
 18 notice of termination of the Lease. Because Shahbazi is not entitled to remain at the Marina
 19 station, and because it is evident from the record that Shahbazi may fail to vacate the Marina
 20 station absent specific direction from the Court, injunctive relief is appropriate. Accordingly,
 21 Shahbazi hereby is ordered to vacate the Marina station within thirty days of the issuance of this
 22 order.

23 **3. Claims Three, Four, and Five**

24 In its third, fourth, and fifth claims, Equilon seeks damages flowing from Shahbazi’s
 25 failure to vacate the Marina station, and from his breach of the Lease and the RSA by posting
 26 disparaging signs at the Marina station. As discussed above, the Court concludes that the Lease
 27 was terminated no later than November 10, 2006, but that the validity of the termination of the
 28

RSA and of the first attempted termination of the Lease is not subject to summary adjudication. Similarly, damages claims arising from breach of the RSA or for breach of the Lease before November 10, 2006 are not subject to summary adjudication. Accordingly, Equilon is not entitled to summary judgment as to the third, fourth, and fifth claims except to the extent that it seeks damages for Shahbazi's failure to vacate the Marina station after November 10, 2006.

4. Claim Six - Injunctive Relief for Disparaging Acts

Equilon seeks an injunction prohibiting Shahbazi from posting disparaging signs at the Marina station. In light of the Court's order directing Shahbazi to vacate the Marina station, the Court need not enjoin Shahbazi from posting signage at the Marina station.

5. Claim Seven - Trespassing

Equilon seeks damages on the basis that Shahbazi is trespassing at the Marina station. Shahbazi does not provide specific argument as to why Equilon is not entitled to summary judgment on this claim. As discussed above, the lease was terminated no later than November 10, 2006. Shahbazi had no legal right to remain on the Marina station premises after that date. Accordingly, Equilon is entitled to partial summary judgment with respect to the trespassing claim solely for the period after that date.

6. Counterclaims by Shahbazi

Shahbazi counterclaims seeking declaratory relief and damages on the basis that the Lease and the RSA were terminated improperly and that he was stopped from selling fuel in violation of those agreements. As discussed above, the Lease was terminated validly no later than November 10, 2006, but the Court cannot determine on the instant motion that the Lease was terminated validly before that date or that the RSA was terminated validly. Accordingly, Shahbazi may be entitled to a declaration that the termination of the RSA and the first attempted termination of the Lease were invalid. However, Shahbazi fails to respond to Equilon's argument that he cannot identify evidence of damages or injury with respect to his counterclaim because he was operating the Marina station at a loss before the first notice of termination of the lease and could have removed any impediment to selling fuel imposed by Equilon. Accordingly,

1 Equilon is entitled to summary judgment to the extent that Shahbazi counterclaims for damages
 2 against Equilon.²⁰

3 **7. Shahbazi's Affirmative Defenses**

4 Shahbazi lists a number of affirmative defenses in his answer. However, he does not
 5 respond to Equilon's motion for summary judgment as to those defenses and has not explained
 6 how those defenses affect the instant analysis. Accordingly, summary judgment is appropriate as
 7 to those defenses to the extent that they do not implicate factual disputes with respect to which
 8 the Court has determined that summary adjudication is inappropriate.

9 **IV. ORDER**

10 Good cause therefor appearing, IT IS HEREBY ORDERED that:

- 11 a. The motions for partial summary judgment are GRANTED IN PART and
 12 DENIED IN PART.
- 13 b. Within thirty (30) days of the date of this order, Shahbazi shall vacate and
 14 surrender the Marina station, and restore to Equilon the use and possession of
 15 the premises.
- 16 c. Within thirty (30) days of the date of this order, Shahbazi shall file a brief, not
 17 to exceed ten pages in length, showing cause why his counterclaim against
 18 Peninsula should not be dismissed for failure to prosecute.
- 19 d. The parties shall appear for a further case management conference at 10.30
 20 a.m. on October 5, 2007.

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 22
 23 ²⁰ To the extent that Shahbazi seeks an extension of time to oppose the motions for
 24 summary judgment, that request is denied for failure to comply with the requirements of Fed. R.
 25 Civ. P. 56(f).

26 On August 28, 2007, the Court received a proposed amended counterclaim from
 27 Shahbazi. Shahbazi may not amend his counterclaim as a matter of course against Equilon,
 28 which has filed a responsive pleading, and the proposed counterclaim is not accompanied by an
 appropriate motion for leave to amend as to Equilon. Even if it were, the Court would not grant
 leave to file this counterclaim as to Equilon at this late stage in the proceedings. Accordingly,
 the Court's analysis of the instant motions is unaffected by this proposed pleading.

1 DATED: August 30, 2007
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JEREMY FOGEL
United States District Judge

1 This Order has been served upon the following persons:

2 Gary Ernest Gray ggray@ggraylaw.com
3 Rosanne L. Mah rosanne.mah@bingham.com
4 Kristen A. Palumbo kristen.palumbo@bingham.com
5 Erica Brand Portnoy erica.brand@bingham.com, angela.ius@bingham.com
6 James Severson james.severson@bingham.com
7 Colin C. West colin.west@bingham.com

8 Notice has been delivered by other means to:

9 Mehdi Shahbazi
10 3030 Del Monte Blvd.
Marina, CA 93933

11 Balwinder Singh
12 3030 Del Monte Blvd.,
Marina, Ca 93933

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